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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 637

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Robert Stueber and James M. Stueber, plaintiffs-appellees, below, by their duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 5, 1949 (R. 444), rehearing denied, February 3, 1949 (R. 445).

In support of this petition, your petitioners respectfully show:

OPINIONS BELOW.

The District Court did not prepare or publish an opinion. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 171 F. (2d) 777.

JURISDICTION.

This Court's jurisdiction is evoked pursuant to the Act of June 25, 1948 c. 646, Sec. 62, Stat. 992, effective September 1, 1948, Title 28, § 1254, U. S. C.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioners,[1] citizens of the State of Illinois, recovered judgments rendered upon the verdicts of a jury in a consolidated action for malicious prosecution against the respondent,[1] a Delaware corporation, in the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Chicago. The damages assessed for the plaintiff, Robert Stueber, was $20,000.00 and for the plaintiff, James M. Stueber, $12,500.00 (R. 388). Defendant thereupon appealed to the United States Court of Appeals, Seventh Circuit. On January 5, 1949, the Court of Appeals reversed the judgments for a new trial (R. 444) and on February 3, 1949, denied the petition for rehearing (R. 445).

1. For convenience, the petitioners are sometimes referred to hereafter as the "plaintiffs" and the respondent as the "defendant".

The plaintiffs filed separate actions at law in the Circuit Court of Cook County, Illinois, charging that the defendant caused the plaintiffs to be falsely arrested, falsely imprisoned and maliciously prosecuted on a charge of receiving stolen property of which charge the respective plaintiffs were acquitted and exonerated upon examination in the Municipal Court of Chicago (R. 2-5, 12-14). These actions were removed by the petitions of the defendant on the ground of diversity (R. 5-7; 15-17). Thereafter the defendant filed its answers denying the allegations of the plaintiffs' complaints in each case (R. 22, 23). The separate causes of action were, upon the order of the District Judge, consolidated before trial (R. 25).

As a part of their proof, the plaintiffs introduced evidence in the form of testimony and exhibits relating to their arrest and detention. Plaintiffs testified that during the morning of September 21, 1946 they were arrested at their partnership place of business by four Chicago police officers who, over their objection, and without a search warrant, searched their basement storeroom and seized certain merchandise. They were taken to the Detective Bureau of the Chicago police department and there fingerprinted, photographed, questioned and then imprisoned in separate cells until approximately 6:00 P. M. on September 23, 1946. About 8:30 A. M. September 23, 1946, B. A. Heinrich, office manager of the defendant, received a telephone call from the Chicago police in response to which he arrived at the Detective Bureau within a half hour and signed complaints for examination charging each of the plaintiffs with the crime of receiving stolen property. About 6:00 P. M. of September 23, 1946, plaintiffs, having been booked for the crime of receiving stolen property upon the complaints signed by the defendant, were released after furnishing bail (R. 46-56; 102-108). Concerning all the foregoing,

the defendant cross-examined at length (R. 66-71; 76-79; 81-85).

The plaintiffs also proved that the defendant subsequently appeared and prosecuted the said charges in the Municipal Court of Chicago, upon which charges the plaintiffs were acquitted and exonerated by the examining magistrate (R. 109) (Pf's Ex. 8, R. 340; Pf's Ex. 20-R. 356).

The plaintiffs further proved the facts surrounding the purchase of the property alleged to have been stolen; their previous business relationships; the number of customers plaintiffs had in their respective individual businesses, and in their partnership business; their previous good reputation as honest and law-abiding citizens in the community wherein they resided and conducted their business; the injury to their reputation and the damages sustained by each of them as a result of the malicious prosecution by the defendant.

At the close of the plaintiffs' case, the defendant filed general motions for directed verdicts of not guilty, which motions were denied (R. 25-26). The Court overruled the following motion made by the defendant at the close of the plaintiffs' case:

> "May we at this time move to strike out all the testimony with reference to their detention from Saturday until the time the complaint was signed." (R. 180-181.)

The defendant proceeded with its defense, in the course of which it introduced evidence concerning the arrest and detention of the plaintiffs, their questioning by Chicago police officers, and offered in evidence testimony and exhibits relating thereto (R. 202-210; Df's. Ex. Nos. 5 and 6; R. 384 C-384 G). At the close of all the evidence the defendant moved the Court to instruct the jury to find the defendant not guilty as to the charges of false arrest and

false imprisonment, which motions were granted by the District Court (R. 385), and the jury so instructed (R. 325). The defendant then made general motions for directed verdicts of not guilty as to the charges of malicious prosecution, at the close of all the evidence, which were denied (R. 386). When the motions for directed verdicts as to false arrest and false imprisonment were granted, the court advised counsel as follows (R. 279-284):

> "By the Court: Now, I have considered this case, gentlemen. I do not believe there is sufficient evidence to go to the jury on the question of false arrest and false imprisonment, aside from the charge of malicious prosecution. In other words, I do not think there is evidence to go to the jury, sufficient evidence to go to the jury, on the question of agency of the officers prior to the time that the defendant by its office manager signed the complaint.
>
> "Accordingly, I think that the only case which I can properly send to the jury is that involving the question as to whether or not defendant is guilty of malicious prosecution."

The court further said (R. 281-282):

> "By the Court: No, from the time the complaint was signed, I think the defendants are responsible for what took place, but this question of malicious prosecution prior to the signing of the complaint, the holding of the plaintiffs was wrongful, but the defendant is not liable for it. That is my view. Now, if you want to preserve your point, I will direct the jury. If you want to dismiss, it is up to you."

Immediately following the ruling of the Court directing the jury on the charges of false arrest and false imprisonment, the defendant requested three instructions which it informed the court "referred to damages without false arrest" (R. 283). An identical instruction relating to each of the plaintiffs was given (R. 328-329). This instruction

was held by the Court of Appeals to be insufficient. When the trial Court instructed the jury to find the defendant not guilty on the charges of false arrest and false imprisonment; he also instructed the jury that the only question for the jury's determination was whether or not the defendant maliciously prosecuted the plaintiffs (R. 325).

He further instructed the jury that plaintiffs must prove that in instituting the prosecution in the Municipal Court of Chicago, the defendant acted wilfully, wantonly and maliciously, and without probable cause (R. 326). All of the instructions to the jury related solely to the conduct of defendant in signing the complaints against the plaintiffs and in prosecuting them. None of the court's instructions related to false arrest, false imprisonment, and detention and treatment of the plaintiffs, other than the instructions tendered by the defendant and given by the court favorable to the defendant that the jury find defendants not guilty on the charges of false arrest and false imprisonment and two identical instructions which the Court of Appeals held were not sufficient so as to be understood by the jury. These instructions are hereinafter quoted verbatim (R. 328).

No further motion was made by the defendant nor did it request instructions or other action by the court with respect to the evidence and exhibits in the case, which related to the charges of false arrest and false imprisonment.

The Court gave special interrogatories as follows:

> "State whether or not defendant wilfully, wantonly, and maliciously, and without probable cause prosecuted plaintiff, Robert Stueber. Answer Yes or No."

A similar interrogatory was given as to the plaintiff James Stueber. These interrogatories were answered in the affirmative by the jury.

The jury found by its general verdict in favor of the

plaintiffs and assessed damages in the sum of $20,000.00 as to Robert Stueber, and as to James Stueber, $12,500.00 (R. 387).

When the motion to strike the testimony relating to the detention of the plaintiffs was made, there was still before the Court and the jury, the charges of false arrest and false imprisonment as well as of malicious prosecution. The motion to strike had not been preceded by any objections to the evidence introduced by the plaintiff; all of the testimony and exhibits (R. 164-165) relating to the arrest and detention of the plaintiffs had been admitted without a single objection by the defendant.

The Court of Appeals held (R. 438-443) that it was properly a question for the jury whether all of the facts and circumstances proved the charge of malicious prosecution; that there was no error in overruling the motions for directed verdicts; that there was no error in the District Court's ruling on the giving and refusing of instructions. The Court of Appeals, however, held that the evidence with respect to the arrest and detention of the plaintiffs by the police, prior to the time the complaints for examination were signed by the defendant, was prejudicial and that the District Court erred in denying the motion to strike made at the close of the plaintiffs' case. In arriving at this conclusion, the Court of Appeals criticized the given instruction tendered by the defendant itself as not sufficient to overcome the alleged error in denying the motion to strike, saying (R. 442):

> "True, the court charged the jury that if they found for plaintiffs then in determining the damages, they should exclude such damages as might have been suffered by plaintiffs as a result of illegal acts. To one skilled in the law this would probably mean that the court had in mind the acts of the police during their detention of plaintiffs prior to the issuance of the

complaint. But we do not think the charge sufficient to advise the jury that defendant was not to be charged with anything done by the police prior to the issuance of the complaints."

The given instruction that was criticized in the above quoted language is as follows (R. 328):

"You are further instructed that if you find the defendant guilty, as charged by the plaintiff Robert Stueber, of malicious prosecution of said plaintiff following the signing of the complaint by defendant's employee, then you should still exclude from your consideration of damages, if any there were, such damages as may have been suffered by said plaintiff as a result of illegal acts, if any there were, committed against said plaintiff prior to the time when the complaint was signed.

"You are further instructed that if you find the defendant guilty, as charged by the plaintiff James Stueber, of malicious prosecution of said plaintiff following the signing of the complaint by defendant's employee, then you should still exclude from your consideration of damages, if any there were, such damages as may have been suffered by said plaintiff as a result of illegal acts, if any there were, committed against said plaintiff prior to the time when the complaint was signed."

The Court of Appeals found no other error in the record of this case. Its opinion does not disclose that the motion to strike was not preceded by objections to the evidence sought to be stricken or that the instructions held by it to be insufficient to overcome the alleged error of the District Court in denying that motion was an instruction that had been given by the District Court at the request of the defendant.

QUESTIONS PRESENTED.

I. Whether the Court of Appeals deprived plaintiffs of their right to trial by jury in presuming the jury too ignorant to understand a simple instruction limiting the evidence to be considered by the jury, in conflict with the applicable decisions of this Court.

II. Whether a motion to strike testimony is proper:

(a) When not preceded by objections to the testimony sought to be stricken;

(b) When it fails to specify precisely the evidence sought to be stricken; and

(c) The matter of the time when a motion to strike testimony may properly be made; and upon whom rests the duty to secure proper instructions to the jury to exclude testimony.

III. Whether the Court of Appeals erred in reversing for harmless error, contrary to Rule 61 of the Federal Rules of Civil Procedure.

IV. Whether in the light of the entire record, the action of the Court of Appeals in reversing the judgment of the District Court for denying a motion to strike testimony admitted without objection, constitutes such a clear departure from the accepted and usual course of judicial proceedings requiring the exercise of this Court's power of supervision.

REASONS FOR GRANTING CERTIORARI.

I.

The Court of Appeals Deprived Plaintiffs of the Right to a Trial by Jury, by Presuming the Jury Too Ignorant to Understand a Simple Instruction Limiting the Evidence to Be Considered by the Jury, in a Way Probably in Conflict With the Applicable Decisions of This Court.

The Court of Appeals reversed the judgments of the District Court rendered upon the verdicts of a jury. In its opinion by District Judge Lindley, it held that the question was properly for the jury, whether all the facts and circumstances in evidence proved the charge of malicious prosecution; that there was no error in overruling the motions for directed verdicts; that there was no error in the District Court's ruling on the giving and refusing of instructions. However, the Court of Appeals engaged in an examination of the evidence with respect to the plaintiffs' arrest and detention by police officers, and held that the District Court erred in denying the defendant's motion to strike certain testimony made at the close of the plaintiffs' case (R. 438-443).

In arriving at this opinion the Court of Appeals criticized as insufficient a simple given instruction tendered by the defendant itself. The Court said in substance, that had that instruction been more specific the effect of the failure to strike the testimony would have been cured, but that the jury was not skilled in law to understand what was meant by the instruction. The Court of Appeals held contrary to the decisions of this Court in indulging in the presumption that the jury was not skilled enough to understand a simple

instruction, although the record discloses no basis for that presumption.

The case of *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 458, is directly in point on a set of facts not as strong as is presented in the instant case. In the *Roy* case this Court said:

> "Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; *and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court.* To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. *The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case.* The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. *The presumption should not be indulged that the jury were too ignorant to comprehend,* or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where

> an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval." (Italics supplied.)

It is respectfully pointed out that in the *Roy* case, above cited, the evidence was held to be *obviously irrelevant,* and was admitted *against the objection of the defendant,* while in the instant case, the allegedly prejudicial evidence was admitted *without objection,* and was *both relevant and competent* as the stage of the trial when admitted and when the motion to strike was made. *Tevis* v. *Ryan* (1914), 233 U. S. 273, 286; *Ross* v. *New York C. & St. L. R. Co.,* 73 F. (2d) 187, 188 (C. A. 6th, 1934). The Court in its charge to the jury in this case, included a simple instruction, which we quote (R. 328-329):

> "You are further instructed that if you find the defendant guilty, as charged by the plaintiff Robert Stueber, of *malicious prosecution* of the said plaintiff *following the signing of the complaint by defendant's employee,* then you should still exclude from your consideration of damages, if any there were, such damages as may have been suffered by said plaintiff as a result of illegal acts, if any there were, committed against said *plaintiff prior to the time when the complaint was signed.*" (Italics supplied.)

The court repeated this instruction relating to the plaintiff, James Stueber. This instruction was preceded by other instructions, which related solely to the question of malicious prosecution and by instructions directing the jury to find the defendant not guilty on the charges of false arrest and false imprisonment. The court charged that the only issue left for the jury's determination was the question of whether or not the defendant maliciously prosecuted the respective plaintiffs (R. 325). All of the instructions re-

lated to the defendant's conduct in signing the complaints (R. 325-330). The criticized instruction is not only simple and easy to understand but is conducive of only one obvious meaning, that defendant was not responsible for any acts committed against the plaintiffs prior to the signing of the complaint by the defendant's employee. That the criticized instruction was understood by the jury is demonstrated by their affirmative answer to the special interrogatories submitted by defendants in this case, and by their verdicts in favor of the plaintiffs.

Reading the instructions together, as they must be read, there was only one issue submitted to the jury, that is, whether in the signing of the complaints by the defendant's employee and in appearing in the Municipal Court of Chicago, and prosecuting the plaintiffs on the charges of receiving stolen property, the defendant acted maliciously and without probable cause. The criticized instruction itself limited for the jury's determination the issue of malicious prosecution of plaintiffs "following the signing of the complaints by defendant's employee", and further excluded from the jury's consideration of damages "such damages as may have been suffered by the said plaintiff as a result of illegal acts committed against plaintiff, *prior to the time when the complaint was signed*" (R. 328-329).

The Court of Appeals in its opinion discussing the criticized instruction stated (R. 442):

> "True, the court charged the jury that if they found for plaintiffs then in determining the damages they should exclude such damages as might have been suffered by plaintiffs as a result of illegal acts. To one skilled in the law this would probably mean that the court had in mind the acts of the police during their detention of plaintiffs prior to the issuance of the complaint. *But we do not think the charge sufficient to advise the jury that defendant was not to be charged*

with anything done by the police prior to the issuance of the complaints.'' (Italics supplied.)

We here point out that the instruction above quoted, when read, meets precisely the criticism directed against it by the Court of Appeals. By leveling this unjustified criticism against the instruction in question and reversing the judgment, *the Court of Appeals substituted its own opinion for the verdicts of the jury in this case.* There is nothing in the record justifying the conclusion that the jury failed to understand this instruction or that it disobeyed the directions of the court. The entire case related to the charges of illegal acts in falsely arresting, falsely imprisoning, and maliciously prosecuting the plaintiffs. How then can the jury be said to have been misled by an instruction which informed them to exclude any illegal acts committed against plaintiffs prior to the signing of the complaints?

In point also is *Rogers* v. *The Marshal,* 68 U. S. 644, 653-654, where this Court said:

> ''These views are decisive of this case. The court charged the jury that it was their province to determine whether the erasure was made 'in consequence of the interference of Hopkins, the attorney,' and the charge was right. It would have been better to use the words 'direction' or 'instruction' instead of 'interference' but, *applying the evidence of the case, it is manifest that the jury rightfully interpreted the charge. A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury.''* (Italics supplied.)

In *First Unitarian Society* v. *Faulkner, et al.,* 91 U. S. 415, 423, this Court held that instructions given by the court to the jury are entitled to a reasonable interpretation and they are not as a general rule to be regarded as the subject of error on account of omissions not pointed out by the excepting party. In this connection it is important

to note that the criticized instruction was that tendered by the defendant and given by the court and no benefit should accrue to the defendant for any error or insufficiency in this instruction.

This Court also said in *Fairmount Glass Works* v. *Cub Fork Coal Co.* (1932), 287 U. S. 474, 485, that the Appellate Courts should be slow to impute to juries a disregard of their duties and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.

The criticized instruction was too clear in itself to be misunderstood by the jury. This is certainly true in the light of the evidence of the case and the remaining instructions given by the District Court. By the mere expediency of presuming the jury not skilled enough to understand a simple instruction, the Court of Appeals for the Seventh Circuit has substituted its own judgment for the verdicts of the jury. By its action in so doing, it has deprived plaintiffs of their right to a trial by jury in contravention of the Seventh Amendment of the Constitution, and contrary to the decisions of this Court.

II.

The Decision of the Court of Appeals for the Seventh Circuit Is in Conflict With the Decisions of Other Courts of Appeal on the Following Important Questions of Federal Practice and Procedure:

A. The Matter of the Dealing With a Motion to Strike Evidence Admitted Without Objection.

B. The Matter of the Time When a Motion to Strike May Properly Be Made and Upon Whom the Duty Rests to Secure Proper Instructions to the Jury to Exclude Evidence.

C. The Proper Form of a Motion to Strike Evidence.

II A. The matter of the dealing with a motion to strike evidence admitted without objection.

In the matter of dealing with a motion to strike evidence admitted without objection, there is a conflict as follows:

With *Brockett* v. *New Jersey Steam Boat Co.*, 18 Fed. 156, 157 (C. Ct. N. D. New York, 1883) (Aff. *Steamboat Co.* v. *Brockett*, 121 U. S. 637) where it was held:

> "Two of the exceptions urged relate to the refusal of the court to strike out certain evidence which was not objected to when offered. Without discussing the question whether the evidence should have been received, had a timely objection been interposed, it is sufficient to say that the rule is well settled that a refusal to strike out in such circumstances, is not error."

With *Puget Sound Power & Light Co.* v. *City of Puyallup*, 51 F. 2d 688, 696 (C. A. 9, 1936) where the Court held:

> "The ruling of the court on this subject was again invoked by motion to strike out testimony already adduced upon this subject. The motion, however, did not specifically indicate the question and answers to be stricken out; moreover, as we have already pointed out, some of this evidence was introduced without objection."

This conflict is not apparent by the reading of the opinion of the Court of Appeals for the Seventh Circuit in the case at bar, which does not disclose that there was no objection made to the admission of the evidence which was later sought to be excluded on a motion to strike.

II B. In the matter of the time when a motion to strike may properly be made and upon whom the duty rests to secure proper instructions to the jury to exclude evidence.

It is also in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the question of proper practice and procedure relating to the time when a motion to strike and instructions to the jury to disregard evidence, should be made. At the stage of the case when the evidence went into the record, the charges of false arrest and false imprisonment were before the court and the jury. The evidence remained competent until the close of all of the evidence, when the court instructed the jury to find defendants not guilty as to the charges of false arrest and false imprisonment. It then became the defendant's duty to have requested the court to charge the jury to exclude from the record the evidence which was allowed in the case relating to the charges of false arrest and false imprisonment, and that the jury be instructed to disregard such evidence. *Tevis* v. *Ryan* (1914), 233 U. S. 273, 286. The defendant made no such request or motion. The motion to strike, the denial of which was held to be error by the Court of Appeals in the case at bar, was made only at the close of the plaintiffs' evidence when the court had overruled a motion for a directed verdict on the charges of false arrest and false imprisonment. That motion was not renewed at the close of all the evidence nor was any further request made to the court for a direction to the jury to disregard such evidence when the motion for directed verdict was granted on these charges.

The proper practice is set forth in the case of *Ross* v. *New York C. & St. L. R. Co.*, 73 F. 2d 187, 188 (C. A. 6,

1934) which is directly contrary to the decision in the case at bar. In that case the Court held:

> "The testimony as to the existence, promulgation and violation of the rule was admissible at the time it was received, for no violation of a safety act had been shown and the case was still being heard under the Federal Employers' Liability Act. When the Court charged the jury that no liability was imposed upon the defendant because of the Federal Employers' Liability Act, counsel for plaintiff should have then requested that all testimony as to the existence, promulgation and violation of the rule be excluded from the record and that the jury be instructed to disregard it. No such request was made."

The decision is also in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Ball* v. *Sheldon*, 218 Fed. 800, 801 (C. A. 2, 1914), where the Court held that the correct practice, when testimony properly admitted over objection has subsequently become incompetent is not to move to strike it out, but to ask an instruction to the jury to disregard it.

II C. As to the proper form of a motion to strike evidence.

The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal as to the proper form of a motion to strike, and is also in conflict with its own decision in the case of *Ford Hydro-Electric Co.* v. *Neely*, 13 F. 2d 361 (C. A. 7, 1926) (cert. den. 273 U. S. 723) where the court overruled a motion to strike testimony which had been preceded by objections to the evidence on the ground that the motion to strike was too general. The court in that case said at page 362:

> "The motion to strike out the evidence of Newton and Williams was properly overruled upon another ground. It was general and indefinite. A motion to strike out testimony should specifically point out the

> portion desired to be stricken. It is not incumbent upon the trial court to pick out testimony 'so far as relates' to a certain subject in order to rule upon the motion."

The motion to strike in the case at bar is too general to be allowed.

Also in conflict is the case of *Puget Sound Power & Light Co.* v. *City of Puyallup*, 51 F. 2d 688, 696 (C. A. 9, 1936).

The motion in the case at bar was general and specified no grounds in support of the motion, nor did it inform the court the precise testimony sought to be sticken (R. 180).

III.

There Is Also a Conflict With Other Courts of Appeal on the Same Matter Relating to a Proper Construction of Rule 61 of the Federal Rules of Civil Procedure Relating to Harmless Error.

The evidence held to be prejudicial by the Court of Appeals was admitted without objections; the defendant introduced similar evidence by its cross-examination and, after the motion to strike was overruled, did as a part of its case, introduce similar evidence in the form of testimony and by exhibits embodying evidence similar to that which was sought to be stricken. The cross-examination of the plaintiffs on their detention and questioning by the police officers, appears at pages 68 to 71 of the record. The introduction of similar evidence as a part of defendant's case appears at record pages 202 to 210. The introduction of defendant's exhibits No. 4 and No. 6 (R. 384C-384G) in the form of written statements taken from plaintiffs by the police officers, which statements fixed the time and place of the questioning of the plaintiffs at a

time prior to the signing of the complaints for examination by the defendant and disclosed their detention and questioning by police officers (R. 279). When it is considered that the Court's instruction to the jury that the only issue left for determination by the jury was the question of whether or not the defendant maliciously prosecuted plaintiffs by instituting the prosecution in the Municipal Court of Chicago (R. 325-326) followed further by the giving of defendant's instructions limiting the jury's consideration of the evidence solely to malicious prosecution, "following the signing of the complaint by defendant's employee" (R. 328-329), any error that existed was thereby rendered harmless.

The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals in the Third Circuit in the case of *Norwood* v. *Great American Indemnity Co.*, 146 F. (2d) 797, 799-800 (C. A. 3, 1944) where error on the part of the trial court in admitting hearsay testimony, was held harmless by reason of opposing counsel's cross-examination on the same matter; by his reference to the matter in interrogating his own witneses; and by his offer of records embodying the same matter. The court said at pages 799 to 800:

> "We think that the error (assuming it to have been such) in the trial court's admission of the insured's conversation with his wife concerning his injury became unsubstantial as the trial progressed.
>
> "The record discloses that on cross-examination of the plaintiff, appellant's counsel elicited substantially the same evidence concerning the accident and its effect, *e. g.*, the insured's complaining of a pain in his head and stating that his heart was missing a beat. In fact, the first question asked plaintiff on cross-examination concerned the insured's expressed apprehension of impending disaster. Further on in the trial, the insured's declarations as to his heart and impending disaster were referred to by appellant's

counsel in interrogating his own expert who utilized that information when giving his opinion that disease was the cause of the insured's death. The appellant also offered in evidence a documentary exhibit which recited substantially the same matters contained in the evidence whereof it now complains. In the light of these circumstances, it is our opinion that, whatever error may have been committed in admitting the evidence in the first instance, the error became harmless in the sense that it became unavailing to the appellant as ground for reversal."

We submit that under Rule 61 of the Rules of Civil Procedure, no clearer case of harmless error can be shown.

IV.

Whether by Permitting Defendant to Secure a Reversal for Error Defendant Itself Committed, the Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Require the Exercise of This Court's Power of Supervision to Prevent a Gross Miscarriage of Justice.

We recognize that certiorari has been sparingly granted for this reason. We earnestly believe that an examination of the alleged error of the District Court considered in the light of the entire record, discloses a clear departure by the Court of Appeals from the accepted and usual course of judicial proceedings.

The motion to strike, the overruling of which was held to be error by the Court of Appeals in the case at bar, related to testimony concerning the detention of the plaintiffs by Chicago police officers prior to the time of the signing of the complaints for examination by defendant.

The motion to strike that testimony was general. It specified no grounds in support of the motion, nor was

the exact testimony sought to be stricken specified for the trial judge. The entire evidence with respect to the arrest and detention by the police officers was admitted without a single objection by the defendant. The entire evidence was competent evidence since there was before the court and the jury at that time when the evidence was admitted, and at the time the motion to strike was made, the charges of false arrest and false imprisonment, as well as the charge of malicious prosecution. *Tevis* v. *Ryan*, 233 U. S. 273, 286; *Ross* v. *New York, C. & St. L. R. Co.*, 73 F. (2d) 187, 188 (C. A. 6, 1934). The defendant cross-examined the witnesses giving such testimony (R. 68-71). After the motion to strike had been denied by the District Judge, the defendant introduced similar evidence in the form of testimony and written exhibits embodying the same matter in the form of written statements taken from plaintiffs by police officers. These statements fixed the time and the place of the questioning at a time prior to the signing of the complaints for examination by the defendant, and disclosed plaintiffs' detention and interrogation by the police officers at the detective bureau (R. 202-210) (Ex. Nos. 4 and 6; R. 384C-384G).

At the close of all the evidence, the District Court granted the defendant's motion and instructed the jury to find the defendants not guilty as to the charges of false arrest and false imprisonment, advising counsel (R. 279):

> "By the Court: Now, I have considered this case, gentlemen. I do not believe there is sufficient evidence to go to the jury on the question of false arrest and false imprisonment, aside from the charge of malicious prosecution. In other words, I do not think there is evidence to go to the jury, sufficient evidence to go to the jury, on the question of agency of the officers prior to the time the defendant by its office manager signed the complaint.
>
> "Accordingly, I think that the only case which I can properly send to the jury is that involving the question

as to whether or not the defendant is guilty of malicious prosecution."

When the District Court made the above ruling, he informed both sides that the defendant was not liable for anything which took place prior to the signing of the complaints, or for the action of the police officers. Defendant made no request to the trial court to have the evidence relating to the charges of false arrest and false imprisonment stricken from the record or for an instruction to the jury to disregard such evidence.

The District Court instructed the jury that the only issue left for their determination was the question of whether or not defendants maliciously prosecuted each of the plaintiffs (R. 325). He further instructed the jury that plaintiffs must prove that in instituting the prosecution in the Municipal Court of Chicago, defendant acted wilfully, wantonly, and maliciously and without probable cause (R. 326). All of the instructions to the jury related solely to the conduct of the defendant in the signing of the complaints and in the prosecution of the plaintiffs (R. 325-330). There is not one word in the instructions of the Court to the jury relating to false arrest and false imprisonment or detention of the plaintiffs, other than in the instructions tendered by the defendant (R. 283) and given by the Court, favorable to the defendant; that the jury find the defendant not guilty as to the charges of false arrest and false imprisonment (R. 325) and the two identical instructions (R. 328-329) which the Court of Appeals has now held were not sufficient so as to be understood by the jury. These instructions were clear enough to be understood by the jury as we have amply shown under Point I and fixed the defendant's responsibility in the case solely "* * * to malicious prosecution of said plaintiff following the signing of the complaint by defendant's employee * * *" (R. 328-329).

In the closing arguments the attorneys for both plaintiffs and the defendant, informed the jury in simple, understandable language, that defendant was not liable for anything done by the police prior to the signing of the complaints and that nothing done by the police prior to the signing of the complaints was binding upon the defendant, nor was the defendant in any way liable for it (R. 294, 295-296); (R. 305-306, 312-313).

For any one of the above reasons, the action of the trial court in denying the motion to strike was proper.

When it is considered that in spite of all the foregoing reasons, the Court of Appeals held that the denial of the motion to strike constituted sufficient error to reverse and remand for a new trial, the defendant has been given the benefit of its own error. A gross injustice has been committed against the District Court and the trial jury, and a gross miscarriage of justice has been inflicted upon the plaintiffs.

WHEREFORE, petitioners pray for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the case entitled *Robert Stueber and James M. Stueber, plaintiffs-appellees* v. *Admiral Corporation, defendant-appellant*, No. 9658, in order that this case may be reviewed and determined by this Honorable Court.

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